TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted]300

INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND CARBON COUNTY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1926

CERTIORARI GRANTED MARCH 22, 1926

(31,707)

(31,707)

SUPREME COURT OF THE UNITED STATES

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No. 984

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1926

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1926

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1925, of said Court, before the Honorable Robert E. Lewis and the Honorable William S. Kenyon, Circuit Judges, and the Honorable Thomas C. Munger, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the tenth day of March, A. D. 1925, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Utah, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America was Appellant and Carbon County Land Company, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 United States of America, District of Utah. } ss.

Pleas of the District Court of the United States for the District of Utah, at a stated term begun and holden at Salt Lake City, on the second Monday, being the tenth day of November in the year of our Lord nineteen hundred and twenty-four and the one hundred and forty-ninth of the Independence of the United States of America.

Present: Honorable Tillman D. Johnson, United States District Judge for District of Utah.

Transcript of the Record.

United States of America, vs. Carbon County Land Company, Independent Coal and Coke Company, and Carbon County. } No. 8224, Equity.

Bill in Equity

filed in said Court on the 16th day of May, 1924, which being entitled in this Court and cause, is in words and figures following, to-wit:

(Bill of Complaint.)

To the Judge of the United States District Court for the District of Utah:

3 The United States by its undersigned solicitor acting herein under authority and direction of the Attorney General brings this bill of complaint against the Carbon County Land Company, a corporation, Independent Coal & Coke Company, a corporation, and Carbon County, and for cause of action alleges:

1. That the defendant companies are corporations organized under the laws of the State of Utah, with their offices and principal places of business in Salt Lake City, in said State and that Carbon County is a municipal corporation of the State of Utah.

2. That during the years 1901 to 1904 there were certified to the State of Utah under certain grants made to the State by the Act of July 16, 1894, (Stats. 109-110) the following described lands, to-wit:

The Northwest quarter and southeast quarter of Section 22; the east half of Section 27; the south half of Section 33; All of Section 34; the south half of Section 35; The north half of Section 26; the north half of section 33; all in Township 12 South, Range 11 East; All of sections one and three; The north half of stection 10; the north half of section 11; the north half of section 12; the southeast quarter of Section 12; the east half of the northeast quarter of Section fourteen (14); in township Thirteen South, Range 10 East; and Lots one, two, and three, and the southeast of the southeast in Section 3; Lot one, northeast quarter of northwest quarter, northeast quarter, North half of southeast quarter, Southeast quarter of Southeast quarter, of Section 7; Township 13 South, Range 11 East, all of Salt Lake Base and Meridian.

3. That the State of Utah executed contracts of sale to said lands to Stanley B. Milner, Truth A. Milner, Har-
4 ley O. Milner, Samuel H. Gibson, and that thereafter on January 7, [1927,] a suit was instituted in this Court by the United States against the said parties, and the defendant herein, the Carbon County Land Company, to which the said contracts of sale had been assigned, for the cancellation of said contracts of sale upon the ground that the said lands were mineral lands, and were known to be such at the time of their selection by the State; said suit was tried on the merits, and testimony was taken, and this Court entered its decree on June 8, 1914, as follows:

"In the District Court of the United States in and for" the District of Utah. Central Division.

United States of America, plaintiff vs. Truth A. Milner, Administratrix of the Estate of Stanley B. Milner, deceased, Truth A. Milner, Harley O. Milner, Carbon County Land Company, a corporation, and Peter N. Campbell, defendants	Old No. 901. New No. 281— In Equity. Decree.

This cause came on further to be heard at this term, and having been argued by counsel, upon consideration thereof,

It is ordered, adjudged and decreed as follows, to-wit:

That the plaintiff is the owner and entitled to the possession of the following described property, to-wit:

The northwest quarter (¼), the southeast quarter [(14)] of Section twenty-two (22); the east [hald] [(12)] of Section twenty-seven (27); the south half of Section thirty-three (33); all of Section thirty four (34); the south half (½) of Section thirty-five (35), in Township twelve (12) south, Range eleven (11) east, Salt Lake Meridian, containing 1920 acres.

The north half (½) of Section twenty-six (26), township twelve (12) south, Range eleven (11) east, Salt Lake Meridian, containing 320 acres.

The north half (½) of Section thirty-three (33), Township twelve (12) south, Range eleven (11) east, Salt Lake Meridian; Lots one (1), two (2), three (3), and the southeast quarter (¼) of the Southeast quarter (¼) of Section three (3) Township thirteen (13) south, Range eleven (11) east, Salt Lake Meridian, containing 477.04 acres.

All of Sections one (1) and three (3); the North half (½) of Section ten (10); the North half (½) of Section eleven (11); the north half of Section twelve (12), township thirteen (13) south, Range ten (10) east, Salt Lake Meridian, containing 2244.24 acres.

The southeast quarter (¼) of Section twelve (12), the east half (½) of the Northeast quarter (¼) of Section fourteen (14), Township thirteen (13) South, Range ten (10) east; Lot one (1); the northeast quarter (¼); the northeast quarter (¼) of the northwest quarter (¼); the north half (½) of the southeast quarter (¼); the southeast quarter (¼) of the Southeast quarter (¼) of section Seven (7), in Township thirteen (13) south, Range eleven (11) east; Salt Lake Meridian, containing 663 acres, making a total amount of five thousand, five hundred and sixty-four and twenty-eight hundredths (5564.28) acres, all situated in the County of Carbon, in the State of Utah, and that plaintiff's title thereto be quieted against any and all claims of the defendants or either of them, or of any person or persons claiming or hereafter to claim through or under the said defendant, or any or either of them; that said defendants, and each of them have no right, title or interest,
6 or right of possession in or to said premises hereinabove described, or to any part thereof; and that the said defendants, and [and] each of them, are perpetually restrained and enjoined from setting up or making any claim to or upon said premises or any part thereof, and all claims of said defendants, and each of them, are hereby quieted.

That the plaintiff be and is hereby adjudged and decreed to be the true and lawful owner of the said lands, as hereinabove described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted against all claims, demands or pretenses whatsoever of the said defendants, and each of them.

It is further ordered, adjudged and decreed, that the plaintiff have and recover its costs herein, taxed at $907.20 against the defendants.

Dated this 8th day of June A. D. 1914.

JOHN A. MARSHALL,
Judge."

4. The decision of this Court was affirmed on appeal by the Circuit Court of Appeals on November 15, 1915, (228 Fed. 451), a copy of the opinion in which is attached hereto as an exhibit and is made a part of this bill.

5. The plaintiff further shows that the State of Utah was not made a party to said suit, and it was believed by the plaintiff that the State would leave to the determination of the Courts, the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination.

6. However, the State of Utah has not seen fit to so conform its subsequent action to the determination of the Courts, but, on the contrary, on February 10, 1920, the State
7 issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned; in so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the before-mentioned suit.

7. The Independent Coal & Coke Company, a corporation, claims an interest in Section three (3) and the North half (½) of Section 10 (10) in Township thirteen (13) South, Range ten (10) East, the full nature and extent of which is unknown to plaintiff, and in respect of which a full discovery is asked of that defendant.

8. Carbon County is made defendant in this bill for the reason that it [claim] a part of said land under a purported tax sale in the year 1921. Plaintiff avers that the lands being the property of the United States were not subject to taxation.

9. The plaintiff avers that said lands have already been determined to be mineral lands and as such not subject to selection by the State, both by the decision of this Court and the Circuit Court of Appeals, and this question is, therefore, [illegible] data.

10. The plaintiff further avers that at all times the title to said lands has been equitably in the United States.

Wherefore, and now that the State of Utah has conveyed the legal title to said lands to the said defendant, Carbon County Land Company, the plaintiff prays that the defendant be adjudged and decreed to hold whatever title they have to the said lands [illegible] for the plaintiff, and to convey the same to the plaintiff, and deliver to the plaintiff any patent or deeds of the said lands in their possession, subject only to the mortgage taken by the State to secure the payment of the purchase price, which said mortgage, unless the State will surrender its claim, will form the subject of an independent suit between the the plaintiff and the State in the Supreme Court of the United States; and that the defendants be restrained and enjoined from hereafter setting up any claim of title to said lands, or any part thereof, or in any manner inter-meddling therewith, or in removing any coal or other product therefrom; and may it please Your Honor to grant unto the plaintiff a Writ of Subpoena to be directed to the said Carbon County Land Company, the Independent Coal & Coke Company, and Carbon County thereby commanding them at a certain time and under certain penalty therein to be limited, personally to appear before this Court and then and there full true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby especially waived, and further to stand to perform and abide by such further order, direction and decree herein, as to this Honorable Court shall seem agreeable to equity and good conscience.

8

S. W. WILLIAMS,
Special Assistant to the Atty. Genl.
Solicitor for the United States.

Exhibit in Bill of Complaint

United States
vs.
Carbon County Land Company, et al.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1915).

Miner, et al.
v.
United States.

Appeal from the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

9 Suit in equity by the United States against Truth A. Milner, executrix of the will of Stanley B. Milner, deceased, and others. Decree for the United States, and defendants appeal. Affirmed.

H. C. Edwards, of Salt Lake City, Utah for appellants.

William W. Ray, U. S. Atty., of Salt Lake City, Utah (David S. Cook, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

Before Garland, Circuit Judge, and Amidon and Van Valkenburgh, District Judges.

Garland, Circuit Judge. This is an action by appellee to quiet the title to 5,564.28 acres of land situated in the County of Carbon, State of Utah. It is claimed by appellee that whatever apparent interest appellants have in the land was obtained by fraud, with the exception of Peter N. Campbell, who claims to have a lien by mortgage. Appellee was granted the relief prayed for in the court below, and appellants appeal.

Before proceeding to discuss the questions involved on this appeal, it is proper to state that by sections 8 and 12 of the act of Congress approved July 16, 1894 (28 Stat 109), there was granted to the state of Utah in the form of what is generally known as a "floating grant", many thousands of acres of land for the purpose of erecting an agricultural college, a school of mines, and a deaf and dumb asylum. Such lands were to be selected by the State from the unappropriated public lands of the United States in such manner as the Legislature thereof should provide, with the approval of the Secretary of the Interior. In 1896 the Legislature of Utah created a board of land commissioners and gave to it the control and management of the lands so granted.

Laws Utah 1896, c. 80. The board was also empowered to select and register such lands, and after this was done it was its duty to take such action as was necessary to secure the approval of the Secretary of the Interior and a final transfer of said selected lands to the State.

Between December 10, 1900, and September 14, 1903, appellants Stanley B. Milner, Truth A. Milner, Harley O. Milner and Samuel H. Gilson, made application to said board of land commissioners to purchase the land involved in this action. The application to purchase by Truth A. Milner, who was the wife of Stanley B. Milner, was made by said Stanley B. Milner as the agent of his wife. The application to purchase made by Harley O. Milner was made by Stanley B. Milner as agent. The following is the form of the application to purchase made in each instance by the appellants:

"Agreement to Purchase Selected Lands.

"County of Salt Lake, State of Utah—ss.:

"Personally appeared before me, a notary public in and for Salt Lake county, Utah, Truth A. Milner, by S. B. Milner, Agt., of Salt Lake City, Utah, well known to me, who, being first duly sworn according to law, deposes and says that he hereby makes application to the state board of land commissioners for the selection by the State of the following described grazing lands (name the class):

No. Acres 320

	Sec.	Tp.	R.	
N ½	26	12 S	11 E	S. L. M.

In satisfaction of any grant to the State.

"That he is a native-born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provision of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one dollar and 50 cents per acre on ten years' time, in accordance with the provisions of the law governing land sales.

"2. The sum of 80 dollars and ..... cents, being 25 cents per acre for the land embraced in the application, is herewith deposited with the State board of land commissioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the state shall be determined to have a superior right or claim to said land, then, in either of said events, the state of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the state a bond conditioned that he will pay the full contract price for said land according to the terms of sale.

"5. That the state of Utah, by its proper officers, will agree to select said land in satisfaction of any of the government grants to the state in accordance with the laws of Utah, and, when so selected and patented to the state, will sell to affiant the same at private sale, for $1.50 per acre.

"TRUTH A. MILNER,
"By S. B. MILNER, Agent.

"Subscribed and sworn to before me this 17th day of April, 1901.

"(Seal) ELLRIDGE L. THOMAS, Notary Public."
Salt Lake City, Utah, Apr. 22, 1901.

12 "The State of Utah hereby agrees to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of State Board of Land Commissioners, BYRON GROO, Secretary."

Each one of these applications was accompanied by an affidavit of each applicant, or his or her agent, of the tenor and effect following:

"State of Utah, County of Salt Lake,—ss.:

April 18, 1901.

"S. B. Milner, Agent, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said

land from the State of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes, under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons, that said land is [essentially] nonmineral land; and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

S. B. MILNER,
Agent.

13 "Subscribed and sworn to before me this 18th day of April, 1901.

"(Seal)

ELLRIDGE L. THOMAS,
Notary Public.

The board of land [commissioners] appointed Heber M. Wells and Byron Groo, who were respectively the president and secretary of said board, as selecting agents for the state. When a list of lands had been selected, these selecting agents filed it in the United States local land office at Salt Lake City, Utah. Said list was accompanied by the joint affidavit of said Heber M. Wells and Byron Groo of the tenor and effect following:

"State of Utah, County of Salt Lake—ss.:

"We, Heber M. Wells, and Byron Groo, authorized agents of the state board of land commissioners of the state of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under Section 12 of an act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state Government, and to be admitted into the Union on an equal footing with the original states,' approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted,

mineral, nor reserved lands, and are of the character contemplated by the grant in said act; that we have caused the lands mentioned to be carefully examined by agents and employees of the state as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel,
or other valuable mineral deposit; that no portion
14 of said land is claimed for mining purposes under the
local customs, or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, that the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named.

"that the land contains no salt spring or deposits of Salt in any form sufficient to render it valuable therefor.

HEBER M. WELLS
BYRON GROO
Agents for the State Board of Land Commissioners.

Subscribed and sworn to before me this 15th day of September, 1903.

ELLRIDGE L. THOMAS,
Notary Public."

After a list of selected lands was filed in the local United States land office, the register and receiver of said land office made a certificate as follows;

"United States Land Office.

"Salt Lake City, Utah, September 15, 1903.

"We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the state of Utah, under the grant to it by the act of Congress, entitled 'An act to enable the people of Utah to form a Constitution

and State government, and to be admitted into the
15 Union on an equal footing with the original states,
approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral lands, or lands, nor claimed as swamp land; neither are there any homesteads, pre-emptions, nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us, and that the said state of Utah has paid to the undersigned, the receiver, the full sum of twenty dollars, in full payment and discharge of said fees.

FRANK D. HOBBS,
"Register U. S. Land Office, Salt Lake City, Utah.

"GEO. A. SMITH,
"Receiver U. S. Land Office, Salt Lake City, Utah."

The list of selected lands was then forwarded to the Commissioner of the General Land Office, accompanied by the following statement:

"State Board of Land Commissioners,
"Salt Lake City, Utah, September 15th, 1903.

"I, Byron Groo, secretary of the state board of land commissioners of the state of Utah, hereby certify that Heber M. Wells, and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the State of Utah.

BYRON GROO,
"Secretary State Board of Land Commissioners.
"List No. 52. Deaf and Dumb Asylum.
"List of Lands Selected by State of Utah.

16 "The undersigned, the duly authorized agents of the
State board of land commissioners of the State of Utah, under and by virtue of the Act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state government and to be admitted into the Union on equal footing with the original states' approved July 16,

1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of the surveyed, unappropriated, unreserved, nonmineral public lands of the United States lying within the state of Utah, said lands being selected and to be applied under Section 12 of said act of Congress 'for the establishment and maintenance of a deaf and dumb asylum.'

HEBER M. WELLS,
"BYRON GROO,
"Agents for the State Board of Land Commissioners.

"Approved by Commissioner General Land Office December 1, 1904."

The application to purchase made by Stanley B. Milner was approved by the board of land commissioners on December 17, 1900, by the local land office on December 18, 1900, and the land certified to the State of Utah by the General Land Office June 22, 1901.

There were two applications by Truth A. Milner, by Stanley B. Milner, her agent. One was made April 19, 1901, approved by the board of land commissioners April 22, 1901, and by the local land office April 29, 1901, and the land certified to the state of Utah by the General Land Office December 23, 1901. The other was approved by the board of land commissioners April 2, 1902, by the local land office April 7, 1902, and the land certified to the state by the General Land Office July 9, 1902.

The application to purchase by Harley O. Milner, by his agent Stanley B. Milner, was approved by the board
17 of land commissioners March 24, 1903, by the local land office March 30, 1903, and the land certified to the state of Utah by the General Land Office May 8, 1904.

The application to purchase by Samuel H. Gilson was approved by the board of land commissioners December 15, 1903, by the local office September 2, 1903, and the land certified to the State of Utah by the General Land Office December 1, 1904. The price agreed to be paid for the lands was $1.50 per acre, payable in ten annual installments. No patents from the state of Utah have been issued to the defendants for the lands in controversy, but the payments as required by the contracts of purchase have been made as therein provided.

The application to purchase and the affidavit accompanying the same, together with the representations of the selecting agents and the resulting certificate of the local land officers, was the evidence upon which the Commissioner of the General Land Office acted in approving the selections. It is claimed by the United States that the certification of the lands by the General Land Office to the state was obtained by fraud, in this: that the applicants to purchase and the selecting agents appointed by the board of land commissioners together with the certificate of the local land officers, all showed the land to be nonmineral and that there was no deposit of coal within the limits thereof.

The affidavit accompanying the application to purchase in each instance stated that the person making the affidavit was well acquainted with the character of the land, and with each and every legal subdivision thereof, having frequently passed over the same, that his personal knowledge of said land was such as to [anable] him to testify
18 [understanding] with regard thereto, and that there was not to applicant's knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal.

Appellee claims that the lands for which application to purchase were made were coal lands, and known to be such by the several applicants. The trial court found this to be true, and that the applications to purchase, and the action of the land office officials based thereon, should be canceled, and title to the lands quieted in the United States. Appellants seek to avoid and otherthrow this claim on the part of appellee on the following grounds:

1. That there was no fraudulent intention on the part of the appellants in applying to purchase the lands.

2. That the lands were not and are not coal lands, because coal is not exposed in commercially available quantities upon each legal subdivision of 40 acres.

3. That the selection of the lands in question having been made in good faith by the state of Utah under the grant of the act enabling Utah to be admitted as a state, it is immaterial whether or not the defendants falsely and fraudulently deceived and misled the selecting officers of the state of Utah as to the character of the lands.

4. That the Secretary of the Interior having certified the lands to the state of Utah under its grant, such certification

is conclusive as to the fact that the lands were of such character as to permit them to be selected under the grant.

(1) Applying the rule laid down by this Court in United States v. Diamond Coal & Coke Company, 191 Fed. 786, 112 C. C. A. 272, and in the same case, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, we are of the opinion after a careful consideration of the evidence that the lands in controversy were at the time of their certification by the Secretary of the Interior to the state of Utah and at the several dates of purchase known coal lands. The same contention is made in this case as was made in the case cited, namely, that lands cannot be regarded as coal lands unless coal in quantity and quality to render its extraction profitable is actually disclosed within their boundaries. In answer to such a contention Justice Van Devanter in the case cited used the following language:

"There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surroundings or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate."

The evidence [shown] beyond question that the lands involved in this action lie along and adjacent to what is commonly known as the "Book Cliffs," or the "Book Cliffs Coal Fields," a sedimentary formation designated as cretaceous, extending from Castle Gate, Utah, eastward to and beyond the Colorado-Utah line. The cliffs themselves [from] the edge of a plateau, and the coal outcropping in the cliffs extends back from the escarpment beneath the plateau lands. Throughout these deposits the coal occurs interstratified with the sedimentary rocks. Three experts examined these lands for the government and testified at the trial as to their character, and all [express] the same opinion as to the character of the lands. These lands lie immediately north of and above a pronounced coal formation upon which at the date of purchase of the lands in question four well known coal mines were being worked upon veins of coal varying in thickness from 7 to 22½ feet; said veins dipping directly into the lands in question. It appears that at no place within the lands involved in this action does the cover above the coal exceed 2,500 feet, and the evidence is uncontroverted that coal at such depth, and of

such quality and quantity as carried by the veins dipping beneath these lands, can be profitably extracted, even though it be necessary that they be mined through shafts or in lines.

As to the fraudulent intent of appellants, they must be held to have intended the natural and probable result of their acts. Gilson and Milner were both men of mature years and had great experience in the business of mining. Gilson testified that some time in 1880 he and Stanley B. Milner entered into an agreement to acquire title to certain lands in Carbon county, Utah, and they were well acquainted with the character of the lands in question, and determined they were not coal lands because there was not disclosed upon their surface coal in quantity and quality to render its extraction profitable. The affidavit accompanying each application to purchase, as we have before stated was to the effect that the applicant was well acquainted with the character of said lands and of [evert] legal subdivision thereof, having frequently passed over the same, and from applicant's personal knowledge was able to state that there was no deposit of coal thereon.

(H) We are satisfied that appellants knew the character of the lands in question, and, having made false statements in regard to the same, must be held to have intended to defraud. Counsel for appellants cite the case of Edmund Burke v. Southern Pacific Railroad Company, 234 U. S. 669, 34 Supt. Ct. 907, 58 L. Ed. 1528, in support of their contention that the approval by the Secretary of the Interior of the selection list containing the lands in question is final and conclusive that the lands were of the character to be certified to the state of Utah under the grant of 1894. No support for any such contention can be found in that case as applied to the facts in the case at bar.

Justice Van Devanter in the Burke case is careful to point out that the rule there announced as to the finality of the action of the Secretary of the Interior does not apply in cases where the officers of the United States have acted upon ex parte fraudulent and false statements. At 234 U. S. 689, 34 Sup. Ct. 915, 58 L. Ed. 1528, in the opinion it is said:

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitled the Secretary of the Interior to have the patent canceled, as was done in Morton v. Nebraska, 21 Wall. 660 (22 L. Ed. 639), and in

Western Pacific Railroad Company v. United States, 107 U. S. 526, 108 U. S. 510, 2 Sup. Ct. 802, 862, 27 L. Ed. 621, 806. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals."

Again, (234 U. S. 682, 34 Sup. Ct. 916, 58 L. Ed. 1527) it is said:

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a nonmineral land law, or if they issue such patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such
22 rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers, who had no interest in the land at the time the patent was issued and were not prejudiced by it. Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 313 (8 Sup. Ct. 131, 31 L. Ed. 182); Diamond Coal Co. v. United States, 233 U. S. 236, 239 (34 Sup. Ct. 597, 58 L. E. 936); Germania Iron Co. v. United States, 165 U. S. 379 (17 Sup. Ct. 357, 41 L. Ed. 754); Duluth & Iron Range Railroad Co. v. Roy, 173 U. S. 587, 590 (19 Sup. Ct. 548, 43 L. Ed. 820); Hoofnagle v. Anderson, 7 Wheat, 212, 214, 215 (5 L. Ed. 438)."

In the case of Washington Securities Company v. United States 234 U. S. 76, 34 Supt. Ct. 725, 58 U. Ed 1220, Justice Van Devanter again said:

"It is contended also that the proceedings resulting in the patents were not ex parte, but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the government. No doubt those officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents; but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were strictly ex parte. The government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the government save in the sense that the land officers did so. As this court has

often held, the findings of the land officers in such a proceeding, although not open to collateral attack, are not conclusive against the government when it sues to
23 cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. United States v. Minor, 114 U. S. 233 (5 Sup. Ct. 836, 29 L. Ed. 110); McCaskill Co. v. United States, 216 U. S. 504 509, (30 Sup. Ct. 386, 54 L. Ed. 590 and cases cited. In such a suit the action of the land officers is given appropriate effect by treating it as presumptively right and as requiring the government to carry the burden of proving the fraud by that class of evidence which commands respect and that amount of it which produces [convicion]. Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239 (34 Sup. Ct. 507, 58 L. Ed. 936)."

(III. LV) It is not the claim of appellee that the officers or [slelecting] agents of the State of Utah or the land officers were guilty of fraud, but that they were imposed upon by the false statements of the appellants and relied upon the same as did the officers of the local land office at Salt Lake City. The applicants to purchase the land in question, the selecting agents of the state, and the land officers of the United States all acted on the theory that mineral lands or lands containing a deposit of coal did not pass under the grant. It is not claimed that such lands passed, in the briefs of counsel, and the pleadings practically admit the allegation of the bill that the lands granted were to be non-mineral. We are of the opinion, however, that no such contention could be sustained under the facts in this case. Section 2318, R. S. U. S. (Comp. St. 1913, Par. 4613), provides:

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

We, held in Frederick A. Sweet, Administrator, v. United States, 228 Fed. 421, ...C. C. A....., that under section 6 of the act of July 16, 1894, (28 Stat. 109) which specifically granted sections 2, 16, 32 and 36 in every township
24 of the proposed State of Utah, mineral lands passed to the State of Utah. We think, however, the case at the bar is clearly distinguishable from that case. Section 6 granted specific lands without qualification or exception and we were of the opinion that to hold that mineral lands were excepted therefrom would be to interpolate into the section by interpretation language that Congress did not choose to use. In the present case, however, the lands are not specified in the statute, but so many thousand acres are granted to the proposed state, to be selected as stated in this

opinion, and we conclude that the certification of these lands by the Secretary of the Interior did not carry mineral lands in direct opposition to section 2318, and the general policy of the United States. It was decided in Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170, that section 2318, above mentioned, included coal lands. Congress did not know when sections 8 and 12, supra, were enacted, what lands the state would select, and therefore could not have had any particular lands in view. When the Secretary of the Interior came to approve the selections made by the state, he was prohibited by section 2318 from approving the selection of mineral or coal lands. It appears from the record that all the agreements to purchase involved in this action were assigned to the Carbon County Land Company of the stock of which Stanley B. Milner is the owner of 99,950 shares, of a total of 100,000 shares capital stock. We find that the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States.

Decree affirmed.

Filed in United States District Court, District of Utah, May 16, 1924. John W. Christy, Clerk.

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25 Motion to Strike of Independent Coal & Coke Company

And now comes the Independent Coal & Coke Company, a corporation, one of the defendants above named and moves the Court to strike from the Bill of Complaint of the defendant that portion of Paragraph 5 which reads as follows, to-wit:

"And it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination," on the ground that said allegation is irrelevant, immaterial, and redundant.

And the said defendant further moves the Court to strike Paraphagh 9 of said Bill of Complaint, on the ground that the same is irrelevant, immaterial, and redundant.

M. E. WILSON
F. C. LOOFBOUROW &
A. R. BARNES,
Attorneys for defendant, Independent Coal & Coke Company.

Service of a copy of the above & foregoing motion to strike acknowledged the 4th day of Sept. 1924.

CHAS. M. MORRIS,
U. S. Attorney.

Filed in United States District Court, District of Utah, Sep. 4, 1924. John W. Christy, Clerk.

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26 Motion to Dismiss of Independent Coal & Coke Company

And now come the Independent Coal & Coke Company, a corporation, one of the defendants above named, and moves to dismiss the Bill of Complaint in the above [title] cause on the following grounds, to-wit:

1.

That the said Bill of Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

2.

That it affirmatively appears from the face of the complaint, that if any cause of action is stated in favor of the plaintiff and against the defendant, that more than six years have intervened between the time said cause accrued to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the Statute of Limitations, made and enacted by the Federal Congress of the United States Government, controlling and governing such causes of action as are attempted to be stated in the Bill of Complaint; said Federal statute being: Section 8 of the Act of March 3, 1891, Chapter 561.

M. E. WILSON
F. C. LOOFBOUROW
A. R. BARNES,
Attorneys for defendant, Independent Coal & Coke Company.

Certificate.

We hereby certify that we, and each of us, are attorneys for the defendant in the above entitled cause; and fur-

ther certify that in our opinion the grounds stated in the above motion are well founded.

M. E. WILSON
FREDERICK C. LOOFBOUROW
ALBERT R. BARNES.

Service of a copy of the above and foregoing motion to dismiss acknowledged this 4th day of Sept. 1924.

CHAS. M. MORRIS,
U. S. Attorney.

Filed in United States District Court District of Utah Sep 4, 1924. John W. Christy, Clerk.

Motion to Dismiss of Carbon County Land Company

And now comes the Carbon County Land Company, a corporation, one of the defendants above named, and moves to dismiss the Bill of Complaint in the above entitled cause on the following grounds, to-wit:

I.

That the said Bill of Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

II.

That it affirmatively appears from the face of the complaint that if any cause of action is stated in favor of the plaintiff and against the defendant, that more than six years have intervened between the time said cause accrued
28 to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the Statute of Limitations, made and enacted by the Federal Congress of the United States Government, controlling and governing such causes of action as are attempted to be stated in the Bill of Complaint; said Federal statute being Section 8 of the Act of March 3, 1891, Chapter 561.

SAMUEL A. KING,
RUSSELL G. SCHULDER,
Attorneys for defendant, Carbon County Land Company.

We hereby certify that we and each of us are attorneys for the defendant in the above entitled cause; and further certify that in our opinion the grounds stated in the above motion are well-founded in law.

SAMUEL A. KING
RUSSELL G. SCHULDER

Service acknowledged this 20th day of Sept. 1924.

EDW. M. MORRISSEY,
Asst, U. S. Atty.

Filed in United States District Court District of Utah Sep 20, 1924. John W. Christy, Clerk.

Motion to Strike of Carbon County Land Company

And now comes the Carbon County Land Company, a corporation, one of the defendants above named and moves the Court to strike from the Bill of Complaint of the defendant that portion of paragraph 5 which reads as follows, to-wit:

"And it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination, on the ground that said allegation is irrelevant, immaterial and redundant.

And the said defendant further moves the Court to strike paragraph 9 of said Bill of Complaint, on the ground that the same is irrelevant, immaterial and redundant.

SAMUEL A. KING,
RUSSELL G. SCHULDER
Attorneys for defendant Carbon County Land Company

We hereby certify that we, and each of us, are attorneys for the defendant in the above entitled cause; and further certify that in our opinion the grounds stated in the above motion are well-founded in law.

SAMUEL A. KING,
RUSSELL G. SCHULDER

Service acknowledged this 20th day of Sept. 1924.

[EWD.] M. MORRISSEY
Asst. U. S. Atty.

Filed in United States District Court District of Utah Sep 20, 1924. John W. Christy, Clerk.

Motion to Dismiss of Carbon County

30 Comes now Carbon County, a municipal Corporation of the State of Utah and one of the defendants above named and moves the Court to dismiss the Bill of Complaint in the above entitled cause upon the following grounds, to-wit:

1. Upon the ground that said Bill of Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against Carbon County, one of the defendants.

2. That it affirmatively appears from the face of the said Bill of Complaint that if any cause of action is stated in favor of the plaintiff against the defendant, that more than six years have intervened between the time said cause accrued to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the Statute of Limitations, made and enacted by the Federal Congress of United States Government, controlling and governing such causes of action as are attempted to be stated in the Bill of Complaint, said Federal Statute being Section 8, of the Act of March 3, 1891, Chapter 561.

HENRY RUGGERI,
Attorney for defendant, Carbon County.

Certificate.

I hereby certify that I am Attorney for Carbon County, one of the defendants in the above and foregoing action, and further certify that in my opinion the grounds stated in the above motion are well founded in law.

HENRY RUGGERI

Service acknowledged this 20th day of Sept. 1924.

EDW M. MORRISSEY,
Asst. U. S. Atty.

Filed in United States District Court, District of Utah, Sep 20, 1924. John W. Christy, Clerk.

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31 **Motion to Strike of Carbon County**

Comes now Carbon County, a body [corporation] and politic of the State of Utah, one of the defendants above named and moves the Court to strike from the bill of complaint of the plaintiff's that portion of paragraph five which reads as follows: "And it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State in acquiring title to the lands, and conform its subsequent action to that determination, on the ground that said allegation is irrelevant, immaterial and redundant.

And the said defendant further moves the Court to strike paragraph nine of said bill of complaint on the ground that the same is irrelevant, immaterial and redundant.

HENRY RUGGERI,
Attorney for Carbon County,
one of the defendants.

Service of a copy acknowledged Sept. 20th, 1924.

EDW. M. MORRISSEY,
Asst. U. S. Attorney.

Filed in United States District Court District of Utah Sep 20, 1924 John W. Christy, Clerk.

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32 (Order sustaining motions to dismiss Bill of Complaint, with leave to plaintiff to amend bill.)

December 17, 1924.

In this cause on the 17th day of December, 1924, the separate motions of said defendants to dismiss the bill herein having heretofore come on regularly for hearing, and having been argued and submitted and by the Court taken under advisement, now after due consideration and the Court being well advised in the premises doth order that said motions be and they are hereby sustained with leave to plaintiff to amend its bill within thirty days in accordance within a written opinion this day handed down and filed herein.

(Opinion of the District Court in sustaining of motions to dismiss.)

The certification by the Secretary of the Interior of the lands in question to the State of Utah was in legal effect a patent and in my opinion comes within the meaning of the word patent as used in Section 8 of the act of March 3, 1891.

The motion of defendants to dismiss will be sustained on the ground that the cause of action alleged in the complaint is barred under the provisions of said section, with leave to plaintiff to amend its complaint within thirty days from this day, if it shall be so advised.

Filed in United States District Court District of Utah Dec 17, 1924. John W. Christy, Clerk.

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33 (Decree, January 21, 1925.)

This cause came on to be heard at the April Term, 1924, of the above-entitled Court, and was argued by counsel and taken under advisement, and thereupon upon consideration thereof at this, the November 1924-25 Term of this Court;

It Is Now Hereby Ordered, Adjudged and Decreed, as follows:

1. That this action and the bill of complaint of the plaintiff herein be and the same are hereby dismissed with prejudice.

And it is further hereby ordered, adjudged and decreed that the defendants have and recover their costs herein taxed at $..... against the plaintiff.

Dated this 21st day of January, A. D. 1925.

THILMAN D. JOHNSON, Judge.

Filed in United States District Court District of Utah Jan 21, 1925. John W. Christy, Clerk.

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34 (Petition for appeal and allowance thereof.)

The above named Plaintiff, feeling itself aggrieved by the decree made and entered on the twenty-first day of January, 1925, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed

herewith, and prays that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

S. W. WILLIAMS
Solicitor for the Plaintiff.

The foregoing claim of appeal is hereby allowed.

TILLMAN D. JOHNSON
United States District Judge.

Filed in United States District Court District of Utah Feb. 21, 1925. John W. Christy, Clerk.

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35 Assignment of Errors.

Now comes the United States by its Solicitor, and in connection with the petition for appeal filed herein says; that in the decree heretofore entered in said cause the Court erred in the following particulars:

1. The Court erred in holding that the suit was barred by the Statute of Limitations.

2. The Court erred in not holding that the suit instituted in 1907 was a direct attack upon the certification.

3. The Court erred in not declaring a trust in favor of the United States.

4. The Court erred in dismissing the Bill of Complaint.

Wherefore, the Plaintiff prays that said decree be reversed and for such other and further relief as it may be entitled to in equity and good conscience.

S. W. WILLIAMS
Solicitor for the United States.

Filed in United States District Court District of Utah Feb 21, 1925. John W. Christy, Clerk.

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36 (Praecipe for Transcript.)

To the Clerk of the Above Entitled Court:

You are requested to make an authenticated transcript of record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the appeal allowed in the above entitled cause, and to include in such transcript

of record the following and no other papers filed in said cause:

Bill of Complaint;

Motions of defendants against said Bill of Complaint.

Opinion of the Court.

Final Decree dismissing Bill.

Petition for Appeal and Order allowing same.

Assignment of Errors.

Original citation showing service, and this Praecipe.

S. W. WILLIAMS,
Solicitor for the United States.

Service of this Praecipe acknowledged this 19th day of Feb. 1925.

WILSON, LOOFBOUROW & BARNES,
W. E. WILSON,
Attorneys for defendant, Independent, Coal & Coke Co.

O. K. CLAY,
County Atty., Carbon County, Utah.

KING & SCHULDER,
RUSSELL G. SCHULDER,
Attorneys for Carbon County Land Company.

Filed in United States District Court District of Utah Feb 23, 1925. John W. Christy, Clerk.

37

Citation on Appeal.

In the United States District Court in and for the District of Utah. Central Division.

United States of America, Plaintiff, vs. Carbon County Land Company, The Independent Coal and Coke Company and Carbon County, Defendants.	No. 8224, Equity.

To Carbon County Land Company, Independent Coal and Coke Company, and Carbon County, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the

Eighth Circuit, to be held at the City of Saint Louis, Missouri, sixty (60) days from date of this citation, pursuant to an appeal on the part of the United States filed in the Clerk's Office of the United States District Court for the District of Utah in the above entitled cause, to show cause, if any there be, why the decision of the District Court in said appeal mentioned should not be reversed and corrected, and speedy justice should not be done in that behalf.

Given under my hand, Salt Lake City, District of Utah, this 19th day of Feby 1925.

TILLMAN D. JOHNSON,
Judge of the United States District Court.

Attest:
JOHN W. CHRISTY,
Clerk,

(Seal United States District Court, District of Utah.)

Service of citation is acknowledged this 19th day of February, 1925.

WILSON, LOOFBOUROW & BARNES
M. E. WILSON,
Attorneys for Independent Coal & Coke Co. Attorneys for Defendants.

O. K. CLAY,
County Atty Carbon County.

KING & SCHULDER
RUSSELL G. SCHULDER
Attorneys for Carbon County Land Company.

Lodged in Clerks office February 23, 1925. John W. Christy Clerk.

38

Certificate of Clerk.

United States of America } ss.
District of Utah. }

I, John W. Christy, Clerk of the District Court of the United States for the District of Utah, do hereby certify that the foregoing pages numbered from one to thirty-six,

both included, contain a full, true, correct and complete copy and transcript of the record, papers and proceedings designated in the praecipe for transcript of the record in that certain suit wherein the United States of America is plaintiff and Carbon County Land Company, Independent Coal and Coke Company and Carbon County, are defendants, numbered 8224, in equity, on the dockets of said Court as full, true, correct and complete as the originals thereof now remain of record and on file in my office, omitting the following papers and proceedings not specified in said praecipe, to-wit:

May	21 '24	Subpoena in Equity and return.
June	2 '24	Notice of lis pendens.
	3	Order time to plead and appearances.
July	26 '24	Order time to plead extended and stipulation.
Aug	30 '24	Order time to plead and set for trial.
Sep	27 '24	Order setting hearing motions.
Oct	3	Entry hearing motions.
	4	Entry hearing motions resumed.
	6	Entry hearing motions concluded and under advisement.

I further certify that the original citation in this cause is hereunto annexed and transmitted herewith.

In Witness Whereof I have hereunto subscribed my
39 name and affixed the seal of said Court at Salt Lake City, in said district this 5th day of March, in the year of our Lord nineteen hundred and twenty-five and the one hundred and forty-ninth year of the Independence of the United States of America.

JOHN W. CHRISTY Clerk.
United States District Court District of Utah.

(Seal United States District Court District of Utah.)

Filed Mar 10 1925 E. E. Koch Clerk.

29 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. S. W. Williams, Special Assistant to the Attorney General, as Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 6987. vs.
Carbon County Land Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

S. W. WILLIAMS,
Spl. Asst. to the Atty. Genl.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 14, 1925.

(Appearance of Mr. Charles M. Morris, United States Attorney, as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

CHAS. M. MORRIS,
United States Attorney for Dist. of Neb.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 25, 1925

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30 (Appearance of Mr. Eustace Smith, Special Assistant to the Attorney General, as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

EUSTACE SMITH,
Spl. Asst. to the Atty. General of the United States.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 21, 1925.

(Appearance of Mr. Mahlon E. Wilson, Mr. Frederick C. Loofbourow and Mr. Albert R. Barnes as Counsel for Appellee Independent Coal & Coke Company.

The Clerk will enter my appearance as Counsel for the Appellees.

MAHLON E. WILSON,
FREDERICK C. LOOFBOUROW,
ALBERT R. BARNES,
Attorneys for appellee Independent Coal & Coke Co.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 17, 1925.

(Appearance of Mr. O. K. Clay as Counsel for Appellee, Carbon County.)

The Clerk will enter my appearance as Counsel for the Appellee, Carbon County.

O. K. CLAY,
County Atty. Price, Utah.

31 (Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 24, 1925.

(Appearance of Messrs. King & Schulder as Counsel for Appellee, Carbon County Land Company.)

The Clerk will enter my appearance as Counsel for the Appellee, Carbon County Land Company.

RUSSELL G. SCHULDER,
SAMUEL A. KING,
630 Judge Building,
Salt Lake City, Utah.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 26, 1925.

(Order of Submission.)

September Term, 1925,

Monday, September 21, 1925.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Eustace Smith, Special Assistant to Attorney General, for appellant, continued by Mr. M. E. Wilson for appellee Independent Coal and Coke

Company, and by Mr. Russell G. Schulder for appellee Carbon County Land Company, and concluded by Mr. Eustace Smith, Special Assistant to Attorney General, for appellant.

Thereupon, this case was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

32

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, A. D. 1925.

United States of America, Appellant,
No. 6987. vs.
Carbon County Land Company, et al., Appellees.

Appeal from the District Court of the United States for the District of Utah.

Mr. Eustace Smith, Special Assistant to the Attorney General (Mr. S. W. Williams, Special Assistant to the Attorney General, filed the brief), for appellant.

Mr. Mahlon E. Wilson (Mr. Frederick C. Loofbourow and Mr. Albert R. Barnes were with him on the brief), for appellee Independent Coal and Coke Company.

Mr. Russell G. Schulder (Mr. Samuel A. King and Mr. Creighton G. King were with him on the brief), for appellee Carbon County Land Company.

Mr. O. K. Clay, County Attorney, filed a brief for appellee, Carbon County.

Before Lewis and Kenyon, Circuit Judges, and Munger, District Judge.

Lewis, Circuit Judge, delivered the opinion of the court.

The appellant filed its complaint in the District Court on May 16, 1924, against appellees, Carbon County Land Company, Independent Coal and Coke Company, corporation, and Carbon County, Utah, alleging that: (a) During the
33 years 1901 to 1904 there were certified to the State of Utah, under the Act of July 16, 1894 (28 Stat. 107), certain described lands, in all 5564.28 acres; (b) the State of Utah executed contracts of sale of said lands to named individuals who assigned them to Carbon County Land Com-

pany; (c) thereafter, in January, 1907, this appellant brought suit in the United States court for the District of Utah against said individuals and the Carbon County Land Company for the cancellation of said contracts, on the ground that the lands were mineral lands and were known to be such at the time they were selected by the State, said suit was tried on its merits and said court entered a decree on June 8, 1914, wherein it was adjudged that plaintiff (this appellant) was the true and lawful owner of said lands and its title thereto was quieted against all claims, demands or pretenses whatsoever of the defendants in that suit, or of any person or persons claiming, or thereafter to claim, through or under the said defendants or any or either of them, that said defendants had no right, title or interest or right of possession in or to said premises, and each of them was perpetually restrained and enjoined from setting up or making any claim to or upon said premises; (d) that decree was affirmed by this court on November 15, 1915 (Milner vs. United States, 228 Fed. 431); (e) on February 10, 1920, the State of Utah issued its patent to said lands to the Carbon County Land Company, the same company to which the contracts of sale had been assigned; (f) appellee Independent Coal and Coke Company now claims an interest in a part of the lands; (g) Carbon County was made defendant because it claims part of the lands under a tax sale made in the year 1921; and it was prayed that defendant Carbon County Land Company be adjudged and decreed to hold whatever title it has to said lands in trust for the plaintiff, to convey the same to plaintiff and deliver to plaintiff any patent or deeds to said lands in its possession, that defendants be enjoined from intermeddling with said lands and removing coal therefrom. Each of the appellees moved to dismiss, on the ground that the suit was barred by the Statute of Limitations, Act March 3, 1891 (26 Stat. 1095). The court sustained each motion on the ground stated and dismissed the bill. This appeal was then taken. In so ruling the learned District Judge said:

"The certification by the Secretary of the Interior of the lands in question to the state of Utah was in legal effect a patent, and in my opinion comes within the meaning of the word patent as used in Section 8 of the act of March 3, 1891."

34 In United States vs. Winona & S. P. R. R. Co., 165 U. S. 463; Shaw vs. Kellogg, 170 U. S. 312, and other cases, it has been held that a certification of lands by the Secretary under statutory authority therefor has the same

legal effect as a patent; and it is argued here that this suit was brought to avoid the certification. We think a mere reading of the bill demonstrates that view is a misconception. As to this suit, it is rather an acceptance of the Secretary's certification than an attack upon it. The Act of March 3, 1891, provides that suits to vacate and annul patents shall only be brought within six years after the date of the issuance of such patents. This suit was not brought to vacate and annul the Secretary's certificate. That is no part of its purpose. No such relief is sought. We think the statute relied on has no application to this case.

In the Milner case, 228 Fed., we reviewed at length the fraudulent methods resorted to for the purpose of procuring certification of the lands to the State for the use and benefit of Carbon County Land Company. The plan made use of the State as a mere conduit through which the lands were to be fraudulently acquired. The State also, as well as the Secretary, seems to have been imposed upon. Before the lands were selected by the State and certified to it the individual defendants in the former suit entered into contracts with the State to purchase the lands at a nominal sum per acre, in event it obtained the certification, and they assigned those contracts to Carbon County Land Company, which company they owned and controlled. They induced the State and Secretary to act on false representations that the lands were not mineral lands, nor valuable as coal lands. According to the charges in this complaint, the legal title passed through the State to that company after it was finally decided that as between appellant and Carbon County Land Company all of the lands belonged to the United States and its title thereto was quieted as against that company. Perforce that decree Carbon County Land Company, in accepting a patent from the State, obtained nothing but the bare legal title. On the facts stated it acquired no beneficial interest in the lands as against the United States, and the purpose of this suit is to obtain a decree that it holds that title in trust for appellant and to compel it to convey the legal title to appellant.

The several motions to dismiss challenged the sufficiency of the bill, on the ground also that the facts pleaded did not show cause for equitable relief.

35 The suit is in aid of the former decree, to obtain the benefits of that decree. As to Carbon County Land Company, it is a supplemental bill, or (more properly ac-

cording to Story) an original bill in the nature of a supplemental bill, and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required, and it may be filed either before or after a decree. Root vs. Woolworth, 150 U. S. 401; Shields vs. Thomas, 18 How. 253, 262; Thompson vs. Maxwell, 95 U. S. 391, 399; Story's Equity Pleadings, Secs. 338, 339, 345, 351b, 355, 429, 432. Cooper on Equity Pleading says (p. 74):

"But a supplemental bill may likewise be filed for the purpose of stating events which have happened subsequent to the decree. * * * (75) But this bill though it is supplemental in respect of the old parties and the rest of the suit, yet to any new party brought before the court by it, and consequently in regard to its immediate operation, it has in some degree the effect of an original bill."

The same authority, on page 98, in reference to bills, not original, to carry a decree into effect, says:

"The necessity for this kind of bill generally arises where persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights under it have become embarrassed by subsequent events. * * * it may be brought by or against a person claiming as assignee of a party to the decree. So an original bill to execute a decree against a purchaser who claimed under parties bound by that decree, was allowed to be a good bill on demurrer."

And the text of both authorities leaves no doubt that on the facts here an assignee of part may be joined as a party with his assignor.

If the case stated in the bill should be made out, it would seem clear that the relief sought should be granted,—as to Carbon County Land Company, that it convey to appellant all of the lands title to which stood in its name when this suit was brought, and deliver to appellant any patent or other conveyance to it from the State; as to Independent Coal and Coke Company, that it make like conveyance of any of the lands conveyed to it, in which it acquired an interest with notice of appellant's rights, or without value. Meader vs. Norton, 11 Wall. 442, 458; Moore vs. Crawford, 130
36 U. S. 122, 128; Jones vs. Van Doren, 130 U. S. 684, 691; Monroe Cattle Co. vs. Becker, 147 U. S. 47, 57. In Moore vs. Crawford, supra, the Chief Justice, speaking for the court, said:

"Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.' Pomeroy Eq. Jur. Sec. 1053."

We think it obvious that the ground on which Carbon County was brought into the case is distinct and independent of anything alleged against the other two defendants, and that the latter have no concern with any relief that might be granted appellant against the county. There is no common interest between it and the other defendants, they are not mutually interested in any issue and the bill was multifarious and subject to demurrer on that ground, although not stated in the motion to dismiss. Walker vs. Powers, 104 U. S. 245, 251; United States vs. Bell Tele. Co., 128 U. S. 315, 352.

The decree below is reversed with direction to dismiss the suit as against Carbon County, Utah, without prejudice, and to permit the other defendants to answer.

Filed November 17, 1925.

37

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1925.
Saturday, November 21, 1925.

United States of America, Appellant,
No. 6987. vs.
Carbon County Land Company, Independent Coal and Coke Company, and Carbon County,

Appeal from the District Court of the United States for the District of Utah.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the suit as against Carbon County, Utah, without prejudice, and permit the other defendants to answer.

November 21, 1925.

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38 (Motion for an order extending time to file petition for rehearing.)

Salt Lake City, Utah.
December 30, 1925.

Mr. E. E. Koch, Clerk,
Circuit Court of Appeals,
Eighth Circuit,
St. Louis, Mo.

My dear Mr. Koch:

I have just returned from having a talk with Mr. Wilson about the case of United States vs. Carbon County Land Company, et al., in which the Circuit Court of Appeals handed down its opinion some little time ago. The way we compute the time to file a petition for rehearing, it will expire on the 17th day of January. Mr. Wilson is very much engaged in the trial of cases now, and I am forced to leave next week for New York and Washington. I would like to go to St. Louis, but I will be rushed for time, and will have to go the quickest way. Will you, therefore, be good enough to see that order is made in the case at once, giving us sixty days additional time in which to prepare, serve and file petition for rehearing in that case? Please also have the order include all of the appellees, to-wit, the Carbon County Land Company, Independent Coal and Coke Company, and Carbon County. Please obtain the order and advise me with respect to the same by return mail, if possible, as I will go to St. Louis if necessary in order to secure the same. I will have to be in Denver the last of next week, and if Judge Lewis is there I will obtain the order personally, but no doubt the usual procedure is to have you obtain it for us.

. . . . . .

Very truly yours,

KING & SCHULDER,
RGS-F by Russell G. Schulder

39 (Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 12, 1926.

(Order extending time to file Petition for Rehearing.)

December Term, 1925.
Tuesday, January 12, 1926.

On motion of counsel for appellees, It is ordered by this Court that the time for filing a petition for rehearing in this cause, be, and the same is hereby, extended and enlarged for a period of thirty days beyond the time fixed by the rules of this Court for the filing of such a petition.

January 12 1926.

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40 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Utah as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America was Appellant and the Carbon County Land Company, et al., were Appellees, No. 6987, as full true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of February, A. D. 1926.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 22, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted]300

FEB 17 1926

WM. R. STANSBU
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

INDEPENDENT COAL AND COKE COMPANY and
CARBON COUNTY LAND COMPANY,
Petitioners.

v.

UNITED STATES OF AMERICA and CARBON COUNTY,
Respondents.

PETITION OF INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY FOR WRIT OF CERTIORARI, AND SUPPORTING BRIEF.

WILLIAM D. RITER,
Attorney for Independent Coal and Coke Company.

FRANK K. NEBEKER,
Attorney for Carbon County Land Company.